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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 678

AUSTIN HERSCHEL,

Petitioner,

vs.

ORLANDO W. WILSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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vs.

ORLANDO W. WILSON, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Austin Herschel, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered July 18, 1966.

OPINIONS BELOW.

The opinion of the Court of Appeals is not reported and is reproduced in Appendix A to this Petition, pages 17-23, *infra.* The United States District Court for the Northern District of Illinois did not write an opinion. Its order striking the Complaint and dismissing the cause of action against both Respondent Wilson and Defendant Dyra is

contained in the Appendix to Plaintiff-Appellant's Brief filed in the Court of Appeals, at page 40; nine copies of the Appendix have been filed with this Court.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 18, 1966. This Court has jurisdiction to review the judgment by a Writ of Certiorari under 28 U. S. C. Section 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED.

Petitioner filed suit against Defendant Patrick J. Dyra and Respondent Orlando W. Wilson, under the Civil Rights Act of 1871 (42 U. S. C. Section 1983) and Section 1343(3) and (4) to recover damages from Defendant Dyra, a Chicago police officer, and to compel Respondent Wilson, Superintendent of the Chicago Police Department, to expunge Petitioner's arrest record from the files of the Chicago Police Department and to declare the Petitioner's arrest void *ab initio*. The relief sought grew out of Petitioner's arrest while distributing an open letter to the late Albert Cardinal Meyer, Archbishop of Chicago. The Complaint against both defendants was stricken and the cause of action dismissed without opinion by the District Court. The Court of Appeals for the Seventh Circuit, one judge dissenting, reversed the dismissal of the damage count against Defendant Dyra and affirmed the dismissal of the count seeking to expunge Petitioner's arrest record and for a declaration that his arrest was void *ab initio*. This Petition seeks the review of the affirmance of the dismissal of Count II of the Complaint.

The questions presented are—

1. Should a United States District Court under 42 U. S. C. Section 1983 compel the official custodian of police

records of a municipality to expunge [*i.e.*, physically remove] a police record of a person who has been arrested without probable cause while exercising a First Amendment right?

2. Should a District Court under 42 U. S. C. 1983 declare that an arrest without probable cause arising from the exercise of a First Amendment right be declared void *ab initio* so that the arrested person can morally and legally say he has not been arrested?

3. Should the duty of a police department to compel and retain arrest records yield as a matter of social policy to a countervailing policy which declares that a person should not suffer the stigma, embarrassment and economic loss of such a record when he is guilty of nothing more than pamphleteering under the First Amendment?

4. Does the retention of such a record constitute an invasion of the arrested person's privacy under the First and Fourteenth Amendments to the Constitution?

STATUTE INVOLVED.

The statute involved is Section 1 of the Civil Rights Act of 1871 (42 U. S. C. Section 1983). This statute is reprinted in Appendix B hereto, page 24, *infra*.

STATEMENT OF THE CASE.

On June 5, 1965 Petitioner filed a complaint against Defendant Patrick J. Dyra and Respondent Orlando W. Wilson in which it was alleged that Petitioner was a citizen and resident of Illinois and that jurisdiction of the District Court rested upon 42 U. S. C. Sections 1983 and 28 U. S. C. Section 1343(3) and (4) to recover damages and for other relief for injury to, and to redress the deprivation of, rights, privileges and immunities secured by the First,

Sixth and Fourteenth Amendments to the United States Constitution (App. 4).

The Complaint charged that on January 1, 1964 Petitioner stood on a public sidewalk and offered quietly to passers-by who showed an interest printed material entitled "Unanswered Christmas Letter to the Cardinal Archbishop of Chicago." A copy of the letter was annexed to the Complaint as Exhibit A (App. 11-14).

The letter was written by Petitioner, a communicant of the Roman Catholic Church, in a constructively critical and temperate tone to the late Albert Cardinal Meyer touching upon what Petitioner believed to be the deteriorating relationships between the Negro and white races in Chicago and criticized the role of the Church in the public school system of the City (App. 11-14).

The Complaint charged that approximately ten minutes after Petitioner began passing out copies of the letter a priest from the Holy Name Cathedral appeared on the steps of the Church in front of which Petitioner was standing and demanded to know who had given him permission to distribute the letter (App. 5). At about the same time Defendant Dyra, a Chicago Police Officer on duty at the intersection, asked Petitioner for a copy of the letter and Petitioner gave one to him. After Defendant Dyra had examined the letter he informed Petitioner that he thought the distribution of the letter was illegal and Petitioner responded that he thought it was entirely legal (App. 6). Defendant Dyra then returned to the intersection to direct traffic.

Approximately fifteen minutes after this exchange with Defendant Dyra and the priest, Petitioner got into his automobile and left the scene. His automobile was immediately curbed by three squad cars of the Chicago Police Department. Petitioner again showed a copy of the letter to the

officers and Petitioner was then arrested (App. 6). There was no warrant for his arrest. The arresting officer was Defendant Dyra.

Petitioner was formally charged with violating Section 36-28, Municipal Code of Chicago (full text of which is at App. 4-5), the so-called handbill ordinance which proscribes the distribution of advertising matter on the public streets. The Complaint further alleged that the priest conspired with Defendant Dyra and the other police officers in causing Petitioner's arrest (App. 6). The complaint against Petitioner was non-suited in the Municipal Court of Chicago (App. 7). The Complaint further alleged that in 1938, 1946 and 1962 the Corporation Counsel of Chicago had informed the superintendents of police then in office about the limitations of the ordinance and carefully advised them that if the material presented political, social, religious and economic issues and arguments it did not come within the proscription of the ordinance (App. 7).

The Complaint set up the educational and professional background of Petitioner and alleged that he was a person of excellent reputation (App. 7). Count II of the Complaint, as amended, was directed at Respondent Wilson, as custodian of records in the Chicago Police Department, to expunge and annul all records pertaining to the arrest of Petitioner on January 1, 1964. The amendment modified the *ad damnum* paragraph of the Complaint by seeking a judgment, order or decree to have the Petitioner's arrest on January 1, 1964 declared void *ab initio* (App. 26).

Defendant Dyra and Respondent Wilson filed motions to strike the Complaint and dismiss the "cause of action" (App. 17 and 19). These motions were granted by the District Court without opinion.

THE DECISION OF THE COURT OF APPEALS.

The Court of Appeals affirmed the dismissal of Count II of the Complaint (seeking the expunging of Petitioner's police record and a declaration that the arrest was void *ab initio*) and reversed the dismissal of the first Count which sought money damages against Defendant Dyra. One Judge dissented, stating that both counts should have been dismissed on the ground that the Court was "unduly extending *Monroe* v. *Pape* when we hold that an arresting officer's honest misunderstanding of the law . . . in the absence of allegations of malice, spite, vindictiveness or intent to deprive the plaintiff of any civil right, may, nevertheless, be the basis for a suit to recover damages under 42 U. S. C. § 1983." (App. A. 23, *infra.*)

The majority opinion in Petitioner's view correctly held that the allegations of Count I of the Complaint, measured against the holding of this Court in *Monroe* v. *Pape,* 365 U. S. 167, 5 L. ed. 2d 492; 81 S. Ct. 473, stated a claim for which relief should be granted. It held there was no question that Defendant Dyra was acting under color of state law when he arrested the Petitioner at a time when Petitioner was exercising an undoubted First Amendment right to pamphleteer freely because the liberty of the press embraces pamphlets and leaflets. *Lovell* v. *City of Griffin,* 303 U. S. 444, 82 L. ed. 949, 58 S. Ct. 666 (App. A. 21, *infra*).

In affirming the dismissal of Count II, the Court of Appeals laid its first premise on the argument that Illinois law provides no remedy to expunge police records in the official files of the Chicago Police Department "regardless of whether the accused has been acquitted, discharged or otherwise released from the charges brought against him. *Kolb* v. *O'Connor,* 14 Ill. App. 2d 81 (1957); *People* v. *Lewerenz,* 42 Ill. App. 2d 410 (1963)." (App. A. 22, *infra.*)

Without the comfort of authority, the Court of Appeals held that "under the obligations which the Chicago Police Department has in maintaining the public safety and welfare in Chicago, the Superintendent of Police is justified and, indeed, duty-bound to compile and retain arrest records of all persons arrested, and that the execution of that policy does not violate plaintiff's right of privacy." (App. A. 23, *infra*.) The opinion failed to discuss the carefully-drawn distinction in Petitioner's briefs before the Court of Appeals between arrests without probable cause in the course of exercising a First Amendment right and arrests with probable cause. The opinion further failed to discuss Petitioner's allegation in his Complaint that his arrest record constituted an economic loss and stigmatized him in the eyes of his friends and associates. (App. 9-10). Moreover, the opinion failed to discuss the possible application of the recent decision of this Court in *Griswold* v. *Connecticut*, 381 U. S. 479, 14 L. ed. 2d 510, as it may bear upon the issue of an invasion of Petitioner's privacy.

REASONS FOR GRANTING THE WRIT.

I. The Issue of Whether a Police Record Stigmatizes a Person Arrested Without Probable Cause While Exercising a First Amendment Right Raises a Fundamental Question at the Core of All Basic Constitutional Rights.

At the center of the issue raised by Count II of the Complaint is the question of whether a person who is arrested without probable cause while exercising a First Amendment right should suffer the odium, embarrassment and economic loss of a police record. At this moment in the files of the Chicago Police Department is a record that the Petitioner was arrested on January 1, 1964 and as of this moment Petitioner must reveal to any prospective and inquiring employer the unadorned fact of an arrest. These consequences are suffered by Petitioner for standing on a street corner and passing out an open letter to his ecclesiastical superior. Should not the First and Fourteenth Amendments under the power conferred upon District Courts under 42 U. S. C., Section 1983 provide a remedy by which the stigma of a police record should be expunged and the arrest declared void *ab initio?*

The research of counsel has revealed no case in which a complaint has been brought under the Civil Rights Act of 1871 to expunge a police record in a non-probable cause arrest while exercising a First Amendment right, and no case in any jurisdiction, state or federal, in which a court has been asked to declare an arrest void *ab initio.*

Petitioner here ought not to suffer the financial and social damage which at this moment has resulted from his arrest to a greater degree than any other citizen who does precisely the same thing unaccompanied by an arrest. Under

the circumstances of Petitioner's arrest, ought not he to be placed in *status quo ante* the millisecond before his arrest by Defendant Dyra on January 1, 1964?

Professor Gellhorn has put the issue very well:[1]

> Similarly, repeated expressions of bitterness about having been arrested merely "on suspicion" or on charges that were later dropped may indicate the desirability of general procedures for surrendering the released person's fingerprint records and photographs. Indeed, *since the very fact of an arrest adds to a man's difficulty in finding suitable employment (even when he has later been exonerated)*, any pattern of complaints about unnecessary arrests should stimulate an inquiry going well beyond the facts of a particular grievance. [Italics supplied.]

II. The Decision of the Court of Appeals Raises Important and Novel Questions Under the Civil Rights Act With Application to Countless Persons Who Have Acquired Police Records in the Course of Exercising Fundamental Constitutional Rights.

In the twelve years since *Brown* v. *Board of Education*, 347 U. S. 483, 98 L. ed. 873, 74 S. Ct. 686, and the other landmark decisions of this Court marking out the boundaries of the protections under the due process and equal protection clauses of the Fourteenth Amendment, countless persons throughout the country have acquired police records for doing no more than eating at a lunch counter, parading peacefully in the streets and demanding integrated education for their children. These records have not resulted because the defendants were engaged in unlawful conduct, but merely because their *peaceful and constitutional* conduct ran athwart countervailing social and political forces in the community determined that the defendants not exercise these rights. The foregoing is true even if one were

1. Gellhorn, "Police Review Boards," Vol. IX *The Columbia University Forum*, No. 3, Summer, 1966, p. 9.

to eliminate from this list all persons who arguably committed an act justifying a probable cause arrest under a state statute or municipal ordinance proscribing "disorderly conduct" and "breach of the peace."

Moreover, Petitioner believes that the possible acquisition of a police record as a result of engaging in civil rights activities has and does discourage persons from engaging in these activities. If true, this is an awesome depressant to the exercise of First Amendment rights.

III. An Arrest Record Stigmatizes and Damages, and When a Person Is Arrested Without Probable Cause While Exercising a First Amendment Right the District Courts Should Provide a Remedy Under 42 U. S. C. Section 1983 to Expunge the Record and Declare the Arrest Void Ab Initio.

The opinion of the Court of Appeals fails to discuss the damage which flows from an arrest record, evidently believing this was either unimportant or the need of the Chicago Police Department to keep records was even more important. The scant six paragraphs devoted to this in its opinion failed to meet what Petitioner believes is a critical issue. However, even if the Court of Appeals had doubts about the damage flowing from the record as a matter of fact, it should have reversed and allowed Petitioner the opportunity to demonstrate the damage at the trial.

Petitioner alleged that because of the police record his future employment had been jeopardized and governmental agencies and some contractors would refuse him employment because of the record. He further specifically alleged that the police record constituted an economic loss to him and that money damages could only partially compensate him for the humiliation and prospective loss of employment stemming from his unlawful arrest on January 1, 1964. Petitioner expressly alleged that the police

record constituted an irreparable loss and damage to his good name (App. 8-10). Respondent himself has recognized this inadequacy: "Civil suits for damages filed against the individual officer have not proved adequately effective in preventing police abuse of authority." Wilson, O. W., "Police Arrest Privileges in a Free Society: A Plea for Modernization," *Police Power and Individual Freedom, The Quest for Balance,* Edited by Claude R. Sowle, Aldine Publishing Co., Chicago, 1962, p. 27.

The issues before the District Court and the Court of Appeals arose upon motions to strike the Complaint and dismiss the "cause of action" (App. 17 and 19). In this posture the Court of Appeals should have taken these allegations to be true. 2 Moore's Federal Practice, para. 12.08, p. 2244. Petitioner is thus prepared to demonstrate the economic loss and damage to him at trial which can not be compensated in money damages.

Underlying the issues raised in Count II of the Complaint is a fundamental choice to our system, i.e., is it more desirable to encourage the unfettered exercise of basic freedoms than it is to equip our law enforcement agencies with devices to prevent anti-social conduct and make the apprehension of offenders easier? Does not the fear of an arrest record possibly produce a *"mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed"?* Meiklejohn, *Free Speech and Its Relation to Self-Government,* 1948, Harper & Brothers, p. 27. (Italics in original.)

Respondent argued in the Court of Appeals that police records justify themselves because record-keeping is essential to the operation of the municipal police department and because the innocent person of today may become tomorrow's criminal. This view apparently was adopted by the Court of Appeals.

If this were a persuasive line of attack then every citizen should be required to have a record on file with the

police. With appropriate constitutional and legislative changes, we could require every citizen to place his fingerprints on file with the police; to require every citizen to carry personal identification papers at all times as they do in Europe; to require every person to report annually to the police and to account for his employment and income and file a statement of his assets and liabilities; to sanction unlimited electronic eavesdropping and unlimited arrests without search warrants and without probable cause. With necessary constitutional modifications, our system could adopt countless devices to facilitate the apprehension of offenders.

Our social and political system has rejected these measures. We have elected not to elevate legitimate police requirements to such a height that our "ordered liberty" is lost. When critical issues of individual rights have been before this Court under the "balancing" and equivalent doctrines the individual has prevailed. See e.g., *Griffin* v. *Illinois*, 351 U. S. 12, 100 L. ed. 891, 76 S. Ct. 585; *Eskridge* v. *Washington*, 357 U. S. 214, 2 L. ed. 2d, 78 S. Ct. 1061; *Gideon* v. *Wainwright*, 372 U. S. 335, 9 L. ed. 2d 799, 83 S. Ct. 792; *Douglas* v. *California*, 372 U. S. 353; 9 L. ed. 2d 811, 83 S. Ct. 814; *Griswold* v. *Connecticut*, 381 U. S. 479, 14 L. ed. 2d 510, 85 S. Ct. 1678; Frantz, The First Amendment in the Balance, 71 Yale L. J. 1424 (1962).

The 1962 *Report and Recommendations of the Commissioners' Committee on Police Arrests for Investigation*, District of Columbia, July, 1962 ("Horsky Report") points up effectively the kind of practical problem which flows from an arrest, at page 68:

> Records or no, a person who has been arrested for "investigation" must answer "Yes" to a Form 57 [Application for Federal Employment, Standard Form] inquiry whether he has ever been arrested, under pain of perjury. The elimination of most of the records of the arrest is not intended to encourage perjury—or lying in the event the inquiry is made by a

private employer. There is no way in which the stigma is removed.

> The Committee is not impressed with the argument that there is no stigma to an arrest for "investigation" when the prisoner is ultimately released. Nor is it persuaded that the stigma can be justified by the argument that it avoids a greater stigma—an arrest for a crime. When we permit arrests on the basis of probable cause, we balance the unfortunate consequences to an individual as to whom there is probable cause—even though he may be innocent—against the consequences to society if such a person is not made available to stand trial for the offense of which there is probable cause to believe that he is guilty. This balance has been struck, and the citizen is prepared to pay the price in individual hardship. * * *

Petitioner is prepared to concede, in cases where an arrest is based upon probable cause, even though the defendant is ultimately acquitted or the charges dismissed, that there should be a record of the proceedings kept by the appropriate law enforcement agency.[2] However, there is no more reason for Petitioner's acquisition of a police

2. The Horsky Report, *op. cit., supra* p. 12, reports the results of a study prepared by students at the Georgetown University Law Center to determine the incidence of probable versus non-probable cause arrests in one precinct in the District of Columbia for the first six months in 1961. The conclusions of the students were reported as follows, at page 58:

Arrests for investigation of	Probable Cause Present	No Probable Cause
Robbery	46	33
Housebreaking	19	33
Larceny	9	7
Assault with dangerous weapon	11	7
Carrying deadly weapon	3	3
Narcotics	5	0
Homicide	4	7
Fugitive from justice	4	1
	101	91

record for his conduct on January 1, 1964 than there is for any other person exercising a comparable right unaccompanied by an arrest. He should not be thus stained for doing what the First Amendment says he may do.

The expunging of Petitioner's record from the files of the Chicago Police Department can not accomplish fully what Petitioner sought in the District Court. Accordingly, Petitioner amended the *ad damnum* paragraph of Count II and asked for a "judgment, order and decree that plaintiff's arrest on January 1, 1964 was void *ab initio*" (App. 26). The expunging of the record does not dispose of the question of what Petitioner may lawfully and honestly do when confronted with the question: "Have you ever been arrested except for minor traffic violations?"

It is contended by Petitioner that the District Court had ample power under 42 U. S. C. Section 1983 to enter such a judgment because that section provides in part that a public official who deprives another of Constitutional rights "shall be liable to the party injured in an action at law, *suit in equity, or other proper proceedings for redress.*" (Italics added.) It is significant that the Court of Appeals did not hold that it lacked such power.

Petitioner uses the word "void" to mean that the arrest had no legal existence or effect; as though it did not exist or, more accurately, as though it did not take place. See e.g., Black's Law Dictionary, Fourth Ed., 1951. In *Tolg* v. *Grimes,* 355 F. 2d 92 (C. A. 5, 1966), Cert. denied, 384 U. S. 988, the issue was whether the passage of the Civil Rights Act of 1964, given a retroactive effect by *Hamm* v. *City of Rock Hill, South Carolina,* 379 U. S. 306, 13 L. ed. 2d 300, 85 S. Ct. 384 (1964), required the invalidation by a Federal Court of a State Court conviction under an anti-trespass statute. The appeal was from an order of the District Court denying the appellant's petition for a writ of

habeas corpus which had been entered prior to the enactment of the Civil Rights Act of 1964, 42 U. S. C. Section 2000 *et seq.* The Court of Appeals for the Fifth Circuit held that the conviction of appellant "must be abrogated and *voided completely.*" 355 F. 2d at 99. (Italics added.)

CONCLUSION.

For the reasons already stated, the decision of the Court of Appeals is an inadequate treatment of the issues posed by Count II of the Complaint, as amended. It fails to analyze: (1) the power of a District Court to grant the relief sought under 42 U. S. C. Section 1983; (2) the issue of the stigmatizing effect of a police record; (3) whether as a matter of policy or constitutional law the record-keeping duties of a municipal police department transcend Petitioner's asserted right to be free of a police record and stain of arrest for doing nothing more than exercising a right given to him by the First Amendment. An opinion with such a paucity of analysis and superficial treatment of an important and novel question should not stand as a guide for the District Courts within the Seventh Circuit, or elsewhere.

There is no logical or just reason why Petitioner should suffer the actual or potential damage, incompensable entirely in dollars, of an arrest record for exercising a right crucial to our system. The fear of the damaging consequences of a capricious arrest ought not to result in the "mutilation of the thinking process of the community . . ."

It is therefore urged that this Petition be granted.

Respectfully submitted,

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APPENDIX A.

OPINION OF COURT OF APPEALS.

JULY 18, 1966.

Before DUFFY, SCHNACKENBERG and KNOCH, *Circuit Judges.*

DUFFY, *Circuit Judge.* This is an appeal from a District Court order granting defendants' motions to strike the plaintiff's complaint and to dismiss this cause of action upon the ground that the complaint failed to state a claim upon which relief could be granted.

On January 1, 1964, plaintiff-appellant was arrested by the defendant Patrick J. Dyra for allegedly violating a City of Chicago ordinance, prohibiting the distribution of advertising matter of any kind in a public way or place.

Section 36-28, Municipal Code of Chicago, reads as follows:

> "It shall be unlawful for any person to distribute advertising matter of any kind on any public way or public place of the city otherwise than from hand to hand, without tossing or throwing, or to distribute, hand out or scatter on any public way any handbills or dodgers of a size four and one-half inches by six inches or larger, or any other loose sheets of advertising matter which would litter the public ways if allowed to drop thereon; provided that such handbills, dodgers, or loose sheets, if enclosed in envelopes or folded or otherwise handed out in such manner as to avoid the likelihood of falling while being passed out, may be distributed from hand to hand if not tossed or thrown."

The complaint alleges that on the day of plaintiff's arrest, defendant Dyra was an officer of the Chicago Police Department on traffic duty at the intersection of State and Superior Streets in Chicago. Having noticed plaintiff distributing some kind of printed material or papers, officer Dyra requested a copy from plaintiff, and after having examined it, told plaintiff that he thought its distribution was illegal. Plaintiff responded by saying that he considered his actions to be legal.

Approximately fifteen minutes after this conversation, plaintiff got into his automobile and started to leave the scene. His automobile was immediately curbed by three police cars, and plaintiff was placed under arrest without a warrant by defendant Dyra.

The complaint further alleges that the officers then took plaintiff to the Chicago Avenue police station where he was booked and formally charged with violation of the handbill anti-litter ordinance. The complaint also alleges plaintiff was denied the right to call an attorney until one hour and fifteen minutes from the time he was taken to the station. It seems to be agreed that after slightly more than an hour at the station, plaintiff was released upon posting a cash bond.

On January 13, 1964, the complaint against plaintiff under the anti-litter ordinance came on for hearing in the Municipal Department of the Circuit Court of Cook County. The cause was non-suited on the City of Chicago's motion.

The material which plaintiff had been distributing just prior to his arrest consisted of copies of an allegedly unanswered letter which he had written the Cardinal Archbishop of Chicago. The letter was critical of the stand of the Cardinal and other members of the Catholic Clergy on certain public issues. Among other things, plaintiff referred to the Legion of Decency pledge in the Catholic

Church, and urged a racial brotherhod or non-discrimination pledge under the same circumstances.

According to the reproduction in the appendix, the letter which plaintiff was passing out was quite lengthy, containing approximately one thousand words. It is not claimed that material distributed by plaintiff came within the exceptions stated in the ordinances as to material folded or enclosed in envelopes.

In Count 1 of the eomplaint herein, plaintiff seeks $125,000 in damages from defendant Dyra. He claims to be entitled to damages because he was deprived of rights, privileges and immunities secured by the Constitution of the United States, and particularly the First, Sixth and Fourteenth Amendments thereof. He asserts Dyra was acting under color of state law. Jurisdiction is claimed under Title 42 U. S. Code, § 1983 and 28 U. S. Code, § 1343(3) and (4).

In Count II, plaintiff requests the Court to order Orlando W. Wilson, Superintendent of the Chicago Police Department, to expunge all records in control of the Department pertaining to plaintiff's January 1, 1964 arrest. Plaintiff seeks further an order from the Court declaring that plaintiff's arrest was void *ab initio*.

As to Count I, defendant Dyra argues that even assuming plaintiff did not violate the handbill anti-litter ordinance in handing out copies of his letter, and that his arrest was therefore erroneous, the bare allegation of a single false arrest is, in itself, an insufficient basis to show a violation of 42 U. S. C. § 1983.[1]

1. 42 U. S. C. 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Although it is pointed out that plaintiff's complaint does not allege that Dyra acted with malice, spite, vindictiveness or with an intent to deprive plaintiff of any civil right, it is clear that plaintiff's complaint does allege more than a simple innocent false arrest.

Plaintiff charges that the police officers, including defendant Dyra, were acting under color of state law at the time of his arrest; that the distribution of his letter was a right secured to him under the First Amendment to the United States Constitution; that prior to arrest, the letter was shown to defendant Dyra and to the other officers; that there were in effect at the time of arrest, opinions of the corporation counsel of the City of Chicago informing the Chicago police that the anti-litter handbill ordinance did not cover pamphlets, expressing purely political, social, religious or economic views; that plaintiff was denied, for a time, the right to call an attorney and that he was forced to make a court appearance after his arrest. The plaintiff then alleges a variety of damages which he claims to have suffered.

In *Smith* v. *Cremins,* 9 Cir., 308 F. 2d 187 (1962), the complaint charged that plaintiff had gone to the Los Angeles airport to distribute a religious tract, and while on a public sidewalk he was seized by police officers who took the tracts from him, destroying some and keeping others. Plaintiff was detained for only ten minutes. He was not arrested and no charges were filed against him. In reversing a dismissal of the complaint, the Ninth Circuit stated:

> "Since it is not disputed that appellees acted 'under color of State law,' the municipal ordinances and code section upon which appellees rely are irrelevant. If appellees' conduct deprived appellant of federal constitutional rights, it would be no defense that the conduct was authorized by municipal enactments. Sec-

> tion 1983 by its express terms imposes liability upon 'every person who, under color of any statute, ordinance' or other state law deprives another of his federal civil rights."

It is clear that the allegations set forth in plaintiff's complaint exceed those which the Ninth Circuit in *Smith* found sufficient to state a claim under 42 U. S. C. § 1983.

Defendant Dyra relies heavily on an earlier Ninth Circuit case, *Agnew* v. *City of Compton*, 239 F. 2d 226 (1956). There, Agnew had been erroneously arrested for violating a municipal ordinance which required a permit to engage in auctioneering. The Court, in dismissing the complaint, brought under 42 U. S. C. § 1983, stated in dictum that "No one has a constitutional right to be free from a law officer's honest misunderstanding of the law or facts in making an arrest."

However, defendant Dyra's reliance on *Agnew* is not well taken. The case was decided prior to the lead case in this area, *Monroe* v. *Pape*, 365 U. S. 167. *Agnew's* principal holding that an allegation of a purpose to discriminate or a purpose to deprive one of any federal rights is essential to the statement of a claim under § 1983 was overruled in *Cohen* v. *Norris*, 300 F. 2d 24. Finally, *Smith* v. *Cremins*, *supra*, decided subsequent to *Agnew* by the same Circuit on facts quite similar to those before us, clearly supports plaintiff's position herein.

There is no question that defendant Dyra was acting under color of state law when he arrested the plaintiff. Similarly, there is no dispute that plaintiff had been exercising a First Amendment right to pamphleteer immediately before being arrested, for the liberty of the press embraces pamphlets and leaflets. *Lovell* v. *City of Griffin*, 303 U. S. 444.

Having examined the circumstances of plaintiff's arrest

as set forth in his complaint and heeding the Supreme Court's advice in *Monroe* v. *Pape, supra,* that § 1983 "should he [*sic*] read against the background of tort liability that makes a man responsible for the natural consequences of his actions," we hold that the complaint set forth a claim against defendant Dyra under 42 U. S. C. § 1983, and that the District Court erred in ordering its dismissal.

Count II of the complaint alleges defendant Orlando W. Wilson is the Superintendent of the Chicago Police Department, and that he supervises the care, custody and control of all the police records in his Department. Plaintiff further alleges that his arrest was without a warrant and without probable cause, and asserts that Wilson's refusal to expunge his arrest record violates his rights of privacy.

As stated below, plaintiff asks for a judgment directing defendant Wilson to expunge and annul all records under his care, custody and control in the Chicago Police Department which pertain to his arrest on January 1, 1964, and declare the arrest void *ab initio.*

Illinois courts have held that absent express legislative authority to the contrary, the superintendent of police may retain all arrest records in the official files of the Chicago Police Department regardless of whether the accused has been acquitted, discharged or otherwise released from the charges brought against him. *Kolb* v. *O'Connor,* 14 Ill. App. 2d 81 (1957); *People* v. *Lewerenz,* 42 Ill. App. 2d 410 (1963).

Many cases are cited in defendant Wilson's brief showing that authorities throughout the country have held that the retention of finger prints and other arrest records by the police even after discharge, does not violate any constitutional "right of privacy" of the accused.

Apparently neither finger prints nor photographs were taken of plaintiff. His complaint is that there exists in the

files of the Chicago Police Department a record of his arrest.

We think that under the obligations which the Chicago Police Department has in maintaining the public safety and welfare in Chicago, the Superintendent of Police is justified and, indeed, duty-bound to compile and retain arrest records of all persons arrested, and that the execution of that policy does not violate plaintiff's right of privacy.

We hold that the District Court was correct in dismissing the complaint insofar as it pertains to Count II.

Having found Count I of the complaint states a claim on which relief may be granted, the order of the District Court will be reversed insofar as it dismissed the complaint which pertains to Count I.

The case will be remanded to the District Court with directions that defendant, Patrick J. Dyra, be permitted to answer the complaint as amended, and that an order be entered dismissing the complaint as to Orlando W. Wilson.

REVERSED IN PART, AND
AFFIRMED IN PART.

KNOCH, *Circuit Judge* (dissenting).

It seems to me that we are unduly extending *Monroe* v. *Pape* when we hold that an aresting officer's honest misunderstanding of the law (however stupid such misunderstanding may appear to us) in the absence of allegations of malice, spite, vindictiveness or intent to deprive the plaintiff of any civil right, may, nevertheless, be the basis for a suit to recover damages under 42 U. S. C. § 1983.

I would affirm the judgment of the District Court with respect to both counts.

APPENDIX B.

STATUTORY PROVISIONS INVOLVED.

Civil Rights Act of 1871, (42 U. S. C. Section 1983):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S. § 1979.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 678

AUSTIN HERSCHEL,

Petitioner,

vs.

ORLANDO W. WILSON,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION.

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OPINION BELOW.

The opinion of the United States Court of Appeals, Seventh Circuit, is reported as *Herschel* v. *Dyra,* 365 F. 2d 17 (7th Cir. 1966) and is set forth in full as Appendix "A" of the Petition for Writ of Certiorari, p. 17.

QUESTION PRESENTED.

Is respondent's refusal to expunge petitioner's arrest record violative of the United States Constitution?

REASON FOR DENYING THE WRIT.

Respondent's refusal to expunge petitioner's arrest record is under authority of law and not in violation of the United States Constitution.

Petitioner treats the issue of whether respondent's refusal to expunge his arrest record is violative of the United States Constitution as a new and unusual question of law. Nothing could be further from the fact. Petitioner ignores a host of state and federal decisions which have decided this question adversely to his contention.

It is clear that respondent's action is taken pursuant to authority of Illinois law. Illinois courts have held that, absent express legislative authority to the contrary, the Superintendent of Police may retain all arrest records in the official files of the Chicago Police Department, regardless of whether or not the accused has been acquitted, discharged or otherwise released from the charges brought against him. The decision of the Circuit Court of Appeals, Seventh Circuit, merely served to codify the law as it has always existed in the state courts.

In *Kolb* v. *O'Connor,* 14 Ill. App. 2d 81, 142 N. E. 2d 818 (1957), several petitioners filed a declaratory judgment action praying for an order of the court "that they are entitled as a matter of right, justice and equity to the removal and/or return to them of such records of identification." All of these petitioners had been discharged, some of state offenses and others of municipal ordinance violations. The trial court denied the motion of the Commissioner of Police of the City of Chicago to strike the complaint. The Commissioner appealed and the Illinois Appellate Court reversed the trial court, upholding the right of the Chi-

cago Police Department to retain the identification records in question. The Court addressed itself with particularity to the issue posed by petitioner herein, stating (pp. 87-88, 91):

> "The plaintiffs also urge that they have the right, irrespective of any statutory mandate, to have the records of identification returned to them since their retention and alleged use by the Chicago police department would constitute an invasion of their right of privacy."
>
> * * * * *
>
> "It is necessary in cases of this kind to reach an equilibrium between conflicting rights, the right of the public to protection and the right of the individual to privacy."
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> * * * * *
>
> "In the case before us the only allegation which is made with reference to the use of the records of identification is that they are kept in the files of the police department and exhibited to the victims of crimes committed in the vicinity, for the purpose of permitting them to make identification. The court takes judicial notice that the records of identification retained by the police department of the City of Chicago are not open to the general public. They are retained in the files of the police department, and the photographs therein contained are under certain circumstances exhibited to persons who have been the victims of crime, for the purpose of enabling them to make an identification."
>
> * * * * *
>
> "The rights of the individual must be subordinate to the safety of the public. The question involved here is one of public policy. The legislature has not indicated what the public policy of the State should be. Without a specific mandate of the legislature ordering the return to an arrested person of all records of identification held by sheriffs or police departments we are constrained to hold that such depart-

ments may retain in their files records of identification such as were here taken for the purpose of such limited exhibition as is here involved."

In *People* v. *Lewerenz*, 42 Ill. App. 2d 410, 192 N. E. 2d 401 (1963), the Illinois Appellate Court reaffirmed the principles as set forth above in *Kolb*. In *Lewerenz*, the defendant, after being acquitted of the offense of sale of narcotics, petitioned the Criminal Court of Cook County to order Superintendent of Police Orlando W. Wilson to return his fingerprints and other identification records. The trial court so ordered, but the Illinois Appellate Court reversed the order. The basis for this reversal was twofold: (1) The Criminal Court had no jurisdiction to enter the order in question, and (2) under the *Kolb* case the Superintendent of Police may keep these identification records, even after acquittal. The Court stated unequivocally that (pp. 412-413): "We adhere to the views expressed in *Kolb* v. *O'Connor* that . . . such [police] departments may retain in their files records of identification . . . ."

The philosophy of the *Kolb* and *Lewerenz* cases are expressions of what consistently has been the public policy of the State of Illinois. *Cf. Poyer* v. *Boustead*, 3 Ill. App. 2d 562, 122 N. E. 2d 838 (1954); *Maxwell* v. *O'Connor*, 1 Ill. App. 2d 124, 117 N. E. 2d 326 (1953).

It is also clear that respondent's action is not violative of the United States Constitution. In *United States* v. *Kelly*, 55 F. 2d 67 (2nd Cir., 1932), the court refused to order Federal Prohibition Agents to return plaintiff's fingerprints taken at the time of his arrest for sale of a quart of intoxicating liquor. The Court, in rejecting plaintiff's contention that the retention of these fingerprints by the authorities violated his personal liberties, said (p. 68):

"Any restraint of the person may be burdensome. But some burdens must be borne for the good of the

community. *Crowley* v. *Christensen*, 137 U. S. at page 89, 11 S. Ct. 13, 34 L. Ed. 620; *Jacobson* v. *Massachusetts*, 197 U. S. at page 26, 25 S. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765; *Molineux* v. *Collins*, 177 N. Y. at page 399, 69 N. E. 727 L. R. A. 104. The slight interference with the person involved in finger printing seems to us one which must be borne in the common interest."

In *State* v. *Tyndall*, 66 N. E. 2d 755 (1946 Ind.), plaintiff was acquitted of a misdemeanor. He then brought suit praying for the (p. 756) "surrender or destruction of his fingerprints, photographs and other identifying records made by city police officers at the time of his arrest." The court, in holding that the "right of privacy" does not demand the surrender or destruction of these records, stated (p. 760):

> "The right of privacy is essentially personal though some courts have labored and found that it entails a property right."
>
> * * * * *
>
> "Appellant really complains of publicity, the antithesis of privacy. What publicity has he already had? What more will be given if the identification data are retained? When he was arrested he was 'slated.' We assume that this included a statement on police records that he had been arrested on a certain date and charged with a certain offense. There followed entries on a court docket of the filing of an affidavit, a plea, a hearing and a judgment dismissing the charge. These records are extant. He does not ask that they be blotted or torn out of the books in which they are contained. But any one may read them for they are public records. His fingerprints, if they are to be of any value to the police, must be filed in a cabinet and indexed in such a manner that they may be found by one who is qualified to read them. So filed they tell nothing to the idle curious whose gossip might hurt his reputation. They are available and valuable only to the

expert searching for criminals and concerned enough, we may assume, to inform himself as to the court's disposition of appellant's case and the final entry of acquittal."

* * * * *

"Every person in the armed services, applicants for passports and for licenses of various kinds, employes of many large corporations, millions of persons in the United States have fingerprints in some public or private set of files. So long as they are kept there they are harmless. Accordingly, we can see no valid reason for their surrender or destruction by the police. At least none so compelling as to justify our substituting a judicial discretion for the executive discretion permitted by the absence of restrictive legislation."

See also *Hansson* v. *Harris*, 252 S. W. 2d 600 (1952 Tex.); *Voelker* v. *Tyndall*, 75 N. E. 2d 548 (1947 Ind.); *Bridges* v. *State*, 19 N. W. 2d 529 (1945 Wis.); 14 A. L. R. 2d 750, 761, 770 (1950); "The Right of Privacy", 4 Harvard Law Rev. 193 (1890); "The Right of Persons Who Have Been Discharged or Acquitted of Criminal Charges to Compel the Return of Fingerprints, Photographs and Other Police Records," 27 Temple L. Q. 441 (1954); also Notes, 26 Boston U. L. Rev. 526 (1946); 23 Notre Dame L. Rev. 380 (1948); 21 Tulane L. Rev. 289 (1946).

These authorities all show that the retention of fingerprints and other arrest records by the police, even after the discharge, does not violate any constitutional right of an accused. *Certainly this is true in the instant case where we are not dealing with fingerprints and photographs, but merely with an arrest record (noting the dates and circumstances of the arrest).*

Petitioner overlooks one obvious purpose for the retaining of records by the Chicago Police Department. It would be impossible to check upon and document the activities of a large metropolitan police force without compiling

records of arrest of arrested persons. To purge these records of information as to particular arrests would open the door to a host of possible abuses and injustices arising from improper and incomplete record keeping.

The purposes of compiling and keeping arrest records were succinctly stated in *Miller v. Gillespie*, 163 N. W. 22 (1917 Mich.). In the *Miller* case, the court reported the facts as follows (p. 22):

> "Owing to what seems to have been either the ignorance or malice of the complaining witness, a warrant was issued by one of the police justices of the city of Detroit for the arrest of the plaintiff, upon a charge of feloniously embezzling and converting to his own use an article of personal property."
>
> * * * * *
>
> "It seems to be clear that he had committed no offense and that the trial ought to have been concluded with a verdict of acquittal."
>
> * * * * *
>
> "Plaintiff is a man of affairs, has a family, consisting of a wife and nine children, was never before arrested or charged with having violated the criminal laws."

Miller filed a bill praying that the Commissioner of Police of Detroit (p. 22) "surrender for cancellation, all statements claimed to have been made in the enforced statements from your orator, also that all references to your orator upon the books, blotters, statements, histories, and in the records or written memoranda of the police department of the city * * * be decreed to be given up for destruction to the register of this court." The trial court refused to order the Commissioner to comply with plaintiff's request and the Supreme Court of Michigan affirmed. The court, in noting the dual purpose of identification records, said (pp. 22-23):

> "It may be assumed, I think, that two purposes are

> supposed to be served by making and preserving in the police department a record such as the one in question here. There may be other reasons and purposes; but two, at least, appear to be fairly obvious ones. The responsible superior police officials are thereby furnished with definite and authoritative data of the activities of the department. This is, I assume, one purpose. The other is the preservation, for future reference and use, of the data so secured. The form of the record before us serves both purposes, and that it was intended to do so is evidenced by the form of the report. It gives information, not only that a person giving a certain name has been arrested, but information also of the personal appearance of the prisoner as well as his nationality and some of his acquirements."

The United States Court of Appeals properly concluded in the instant cause that (365 F. 2d 17, 20):

> "We think that under the obligations which the Chicago Police Department has in maintaining the public safety and welfare in Chicago, the Superintendent of Police is justified and, indeed, duty-bound to compile and retain arrest records of all persons arrested, and that the execution of that policy does not violate plaintiff's right of privacy."

Based upon lawful authority and upon the administrative obligations of the Chicago Police Department in maintaining the public safety and welfare, Respondent is justified and duty bound to compile and retain arrest records of all persons arrested. This action is not violative of any right accorded Petitioner under the United States Constitution.

CONCLUSION

Petitioner's arrest record is retained in the official files of the Chicago Police Department under authority of law. Such retention does not violate any right accorded him under the United States Constitution. The trial court properly dismissed Count II of the complaint. The Court of Appeals was correct in affirming this dismissal.

For these reasons, the petition for writ of certiorari should be denied.

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